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FILED
05/08/2023
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Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0745-R-2022
Lambert, Kathryn
5.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANTS: Annie R. Carroccia; Matthew L. Carroccia

CASE 43B-0745-R-2022
43B 106305-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

This claim appeared in the Preliminary Decree with the following remarks:

AN AMENDMENT WAS SUBMITTED ON 03/05/2018 REQUESTING TO AMEND THE PERIOD OF DIVERSION. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

THE CLAIMED POINTS OF DIVERSION ARE IN QUESTION. THE LOCATION OF THE HEADGATES CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 171.5 TIMES THE CAPACITY OF THE RESERVOIR.

The issue remarks were not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA.

Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimants an opportunity to file additional information or evidence. As agreed by the claimants, the December 1, 2022 Court Minutes and Order Setting Deadlines Pursuant To Section 85-2-248(5), MCA were entered directing the claimants to meet with the Montana Department of Natural Resources and Conservation [“DNRC”] to resolve the issue remarks. On December 21, 2022 the DNRC Memorandum was filed. It makes recommendations concerning the volume, period of diversion, and point of diversion, in particular stating that the marked aerial photograph attached to the 2018 Amendment resolves the point of diversion issue remark. On February 21, 2023 the claimants filed their Response stating they agree with the DNRC Memorandum recommendations. These documents are viewable in the Court’s FullCourt Enterprise case management system.

APPLICABLE LAW

“All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section.” Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. The Preliminary Decree states that the period of diversion and period of use are each MAY 1 TO AUGUST 15. The period of diversion and period of use should each be APRIL 15 to OCTOBER 15.

2. The Preliminary Decree identifies five points of diversion including one in the SWSENE section 22, T4N, R13E, SWEET GRASS. The marked aerial photograph attached to the 2018 Amendment shows it is in the SESWNE. The legal description for this point of diversion should be SESWNE section 22, T4N, R13E, SWEET GRASS. The point of diversion issue remark should be removed as addressed and resolved.

The abstract of this claim includes the following reservoir data:

Diversion to Reservoir: # 1
Dam Height: 14.00 FEET
Depth: 11.00 FEET
Surface Area: 2.00 ACRES
Capacity: 8.80 ACRE-FEET

The reservoir data should be:

Diversion to Reservoir: # 5
Dam Height: 18.00 FEET
Depth: 15.00 FEET
Surface Area: 5.66 ACRES
Capacity: 33.96 ACRE-FEET

3. The Preliminary Decree does not include a quantified volume. Instead it includes the following standard direct flow irrigation volume remark: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. Although this claim includes a reservoir, it is primarily a direct flow system. The volume should not be changed. The following standard clarification remark should be added: PRIMARILY A DIRECT FLOW SYSTEM; VOLUME NOT DECREED.

4. Preliminary Decree also includes the following notice remarks:

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

RESERVOIR RECORD WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

These two remarks provide notice of changes made prior to issuance of the Preliminary Decree

and do not raise unresolved issues which need to be addressed. These remarks and the notice remark concerning the 2018 Amendment should be removed as having served their notice purposes.

CONCLUSION OF LAW

The information provided by the 2018 Amendment and the DNRC Memorandum is sufficient to contradict and overcome the prima facie claim and sufficient to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

Annie R. Carroccia
Matthew L. Carroccia
617 Wheeler Creek Rd
Big Timber, MT 59011

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 106305-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: MATTHEW L CARROCCIA
617 WHEELER CREEK RD
BIG TIMBER, MT 59011

ANNIE R CARROCCIA
617 WHEELER CREEK RD
BIG TIMBER, MT 59011

Priority Date: OCTOBER 21, 1889
Type of Historical Right: USE
Purpose (use): IRRIGATION
Irrigation Type: FLOOD
Flow Rate: 7.50 CFS
***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.
PRIMARILY A DIRECT FLOW SYSTEM; VOLUME NOT DECREED.
Climatic Area: 3 - MODERATE
***Maximum Acres:** 240.30
***Source Name:** OTTER CREEK
Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESWNE	22	4N	13E	SWEET GRASS
*Period of Diversion: APRIL 15 TO OCTOBER 15						
Diversion Means: HEADGATE						
2		SWSESW	24	4N	13E	SWEET GRASS
Period of Diversion: APRIL 15 TO OCTOBER 15						
Diversion Means: HEADGATE						
3		SESESW	24	4N	13E	SWEET GRASS
Period of Diversion: APRIL 15 TO OCTOBER 15						
Diversion Means: HEADGATE						
4		SWSWSE	24	4N	13E	SWEET GRASS
Period of Diversion: APRIL 15 TO OCTOBER 15						
Diversion Means: HEADGATE						
5		SENWSE	23	4N	13E	SWEET GRASS
Period of Diversion: APRIL 15 TO OCTOBER 15						

Diversion Means: HEADGATE
***Reservoir:** OFFSTREAM

	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
		NENWNW	25	4N	13E	SWEET GRASS
Diversion to Reservoir: DIVERSION # 5						
Dam Height:	18.00 FEET					
Depth:	15.00 FEET					
Surface Area:	5.66 ACRES					
Capacity:	33.96 ACRE-FEET					

Period of Use: APRIL 15 TO OCTOBER 15

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	7.00		W2E2SW	23	4N	13E	SWEET GRASS
2	18.70		SE	23	4N	13E	SWEET GRASS
3	24.70		S2SW	24	4N	13E	SWEET GRASS
4	61.60		SE	24	4N	13E	SWEET GRASS
5	5.50		N2N2NW	25	4N	13E	SWEET GRASS
6	122.80		NE	25	4N	13E	SWEET GRASS
Total:	240.30						